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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/529,264	12/19/2005	Veronique Ferrari	05725.1420.0000	2132
22852	7590	01/28/2010		
FINNEGAN, HENDERSON, FARABOW, GARRETT & DUNNER LLP 901 NEW YORK AVENUE, NW WASHINGTON, DC 20001-4413				
EXAMINER				
LOVE, TREVOR M				
ART UNIT		PAPER NUMBER		
1611				
MAIL DATE		DELIVERY MODE		
01/28/2010		PAPER		

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

### Office Action Summary

**Application No.**

10/529,264

**Applicant(s)**

FERRARI ET AL.

**Examiner**

TREVOR M. LOVE

**Art Unit**

1611

**Period for Reply** -- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

- 1) ☒ Responsive to communication(s) filed on 18 November 2009.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

- 4) ☒ Claim(s) 67-129 is/are pending in the application.
- 4a) Of the above claim(s) 68, 77-81, 92-95, 103 and 120-129 is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 67, 69-76, 82-91, 96-102 and 104-119 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

**Priority under 35 U.S.C. § 119**

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

**Attachment(s)**

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftperson's Patent Drawing Review (PTO-948)
- 3) ☒ Information Disclosure Statement(s) (PTO/SB/08)  
Paper No(s)/Mail Date 11/18/2009
- 4) ☐ Interview Summary (PTO-413)  
Paper No(s)/Mail Date \_\_\_\_\_
- 5) ☐ Notice of Informal Patent Application
- 6) ☐ Other: \_\_\_\_\_

### **DETAILED ACTION**

Acknowledgement is made to Applicant's response filed 11/18/2009.

Claims 67-129 are pending.

Claims 1-66 remain cancelled.

Claims 67, 68, 71-81, 96, 101, 102, 120, 127-129 are currently amended.

Claims 68, 77-81, 92-95, 103, and 120-129 are withdrawn.

Claims 67, 69-76, 82-91, 96-102, and 104-119 are currently under consideration.

### ***Information Disclosure Statement***

The information disclosure statement filed 11/18/2009 fails to comply with 37 CFR 1.98(a)(2), which requires a legible copy of each cited foreign patent document; each non-patent literature publication or that portion which caused it to be listed; and all other information or that portion which caused it to be listed. It has been placed in the application file, but the information referred to therein has not been considered.

### ***Claim Rejections - 35 USC § 102***

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

**Claims 67, 69-76, 82-91, 96, 97, 101, 102, and 104-119 are rejected under 35 U.S.C. 102(b) as being anticipated by Anton et al (U.S. Patent number 6,153,206, Patent issued Nov. 28, 2000) (IDS reference).**

With regard to **instant claim 67**, Anton teaches a cosmetic composition comprising an oil component and a particulate matter component, wherein the composition further comprises an uncrosslinked synthetic polymer consisting of polymerized ethylenically unsaturated monomers of methacrylate ester monomers (see claim 1). Anton teaches at least two types of monomers, monomer "A" which, if polymerized, would yield a polymer having a glass transition temperature of -10 to 75°C, and monomer "B" which, if polymerized, would yield a polymer having a glass transition temperature of 76 to 120°C (see claim 1). It is noted that when the composition is in the form of the polymer "AAAABBBB" (which is a type of polymer taught in the table in column 4), that both **AAAABBB** and **AAAABBBB** are block homopolymers, and **AAAABBBB** is an intermediate random block which comprises at least one constituent monomer from each of blocks A and B. It is further noted that the intermediate random block can also be defined as **AAAABBBB** or **AAAABBBB**.

It is noted that while Anton is silent as to the percent transfer and the polydispersity index, it is the position of the Examiner that absent evidence to the contrary, the compositions being similar, if not the same, would necessarily have a percent transfer and polydispersity index which are similar, if not the same.

With regard to the dependent claims, it is the position of the Examiner that absent evidence to the contrary, the compositions being similar, if not the same, would

necessarily have a percent transfer and solubility which are similar, if not the same, this reads on **instant claims 69 and 70**. Anton teaches the two main blocks have glass transition temperatures (Tg) of -10 to 75°C and 76 to 120°C respectively (see claim 1). Said values encompass a plurality of values wherein the difference in (Tg) values is at least 10°C and block A is less than 20 and block B is greater than 40, this reads on **instant claim 71, 74, 83, 84, and 88**. When said intermediate is defined as AAAABBBB the (Tg) of the intermediate would necessarily be between (Tg) values of the A and B blocks, this reads on **instant claim 72**. With regard to the limitation that the first and second blocks are mutually incompatible, it is the position of the Examiner that, absent evidence to the contrary, that since the composition of Anton is similar, if not the same as the instant invention, that both blocks would have the same incompatibility with the oil component as the instant invention. Therefore, since the composition is similar, if not the same, absent evidence to the contrary, it is the position of the Examiner that the composition of Anton meets the limitation of "mutually incompatible" as defined in the instant specification, and therefore reads on **instant claim 73**. The weight proportions of the first (A) and second (B) repeating units in the copolymer can vary from 2-99% by weight of the first repeat unit to 1-98% by weight of the second repeat unit, and vice versa, wherein it is noted that a 50/50 ratio is preferred (see column 5, lines 1-7 and 28-31), this reads on **instant claims 75, 76, and 82**. Said first repeating unit (A) is taught as being methyl methacrylate (see column 5, line 40-44), this reads on **instant claims 85-86**. When said polymer is defined as AAAABBBB, wherein AAAABBBB is an intermediate, both AAAABBBB and AAAABBBB are

homopolymers, this reads on **instant claims 87 and 91**. Said second repeating unit (B) is taught as being hexylmethacrylate (see column 5, line 45-48), this reads on **instant claims 89 and 90**. Anton teaches that mixtures of methacrylic acid esters can be utilized as either block (A) or (B) (see claims 6-12), this reads on **instant claims 96, 97, 101, and 102**. Anton further teaches that the composition can have a molecular weight of 50,000 (see column 5, lines 30-32), this reads on **instant claims 104 and 105**.

There is no indication in Anton that the composition is required to be an elastomer, this reads on **instant claim 106**. Anton teaches that the copolymer is present as 3-30% of the composition (see column 11, line 10), this reads on **instant claim 107**. Said composition comprises volatile oils, wherein said volatile oil is present in an amount of 10-40% and can be isodecane (see column 6, lines 65-66 and column 11, lines 11-12), this reads on **instant claims 108-110**. Said composition comprises non-volatile oils, wherein said not volatile oil is present in an amount of 10-30% and can be a nonvolatile hydrocarbon (see column 7, lines 43-45 and column 11, lines 13-15), this reads on **instant claims 111-113**. The composition further comprises waxes in an amount of 1-30% (see column 11, lines 16-19), this reads on **instant claims 114 and 115**. The composition of Anton can further comprise pigments (see column 9, lines 28-29), this reads on **instant claim 116**. Said composition can also comprise excipients such as preservatives, antioxidants, vitamins, and emulsifiers (see column 11, lines 5-7), this reads on **instant claim 117**. The composition of Anton can be in the form of an anhydrous stick (see column 2, lines 32-34 and column 11, lines 8-9), this reads on **instant claims 118 and 119**.

*Response to Arguments*

Applicant argues in the remarks filed 11/18/2009 that the teachings of Anton do not anticipate the instant claims since there are embodiments of Anton which do not read on the instant invention, specifically with regard to the glass transition temperatures. Applicant's arguments are not found persuasive since first, the ranges overlap the instantly claimed invention, and second, the polymers which make up the components which define the glass transition temperature of the composition are the same as those of the instant invention. Since a product can not be separated from its properties, the components of Anton would necessarily have the same glass transition temperatures. MPEP 2112.01 states: "Where the claimed and prior art products are identical or substantially identical in structure or composition, or are produced by identical or substantially identical processes, a *prima facie* case of either anticipation or obviousness has been established. *In re Best*, 562 F.2d 1252, 1255, 195 USPQ 430, 433 (CCPA 1977). "When the PTO shows a sound basis for believing that the products of the applicant and the prior art are the same, the applicant has the burden of showing that they are not." *In re Spada*, 911 F.2d 705, 709, 15 USPQ2d 1655, 1658 (Fed. Cir. 1990)." Applicant disagrees with the identification that the composition of Anton comprises homopolymers **AAAABBBB** and **AAAABBBB**, and an intermediate random block **AAAABBBB**. Applicant states that a polymer which comprises **AAAABBBB** is by definition a diblock and has no intermediate block in between. Applicant further argues that the identified intermediate block is not random "because there is a recognizable pattern in this block" (see remarks, page 23). Applicant's arguments are not found

persuasive. The nomenclature designated to a polymer can vary. For instance, a polymer which comprises ABC can be called a monomer, if said ABC is a repeating unit, ABC can also be called a triblock copolymer wherein "A", "B", and "C" are all different blocks, ABC can also be called a diblock copolymer wherein "AB" or "BC" are considered a single block, or ABC can be called a random block copolymer. In the instant scenario, AAAABBBB can have a plurality of designations, however, one of ordinary skill in the art would readily identify that AAAABBBB can appropriately be identified as two homopolymers either attached to each other directly, or attached by a random block copolymer.

### ***Claim Rejections - 35 USC § 103***

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.



This application currently names joint inventors. In considering patentability of the claims under 35 U.S.C. 103(a), the examiner presumes that the subject matter of the various claims was commonly owned at the time any inventions covered therein were made absent any evidence to the contrary. Applicant is advised of the obligation under 37 CFR 1.56 to point out the inventor and invention dates of each claim that was not commonly owned at the time a later invention was made in order for the examiner to consider the applicability of 35 U.S.C. 103(c) and potential 35 U.S.C. 102(e), (f) or (g) prior art under 35 U.S.C. 103(a).

**Claims 98-100 are rejected under 35 U.S.C. 103(a) as being unpatentable over Anton et al (U.S. Patent number 6,153,206, Patent issued Nov. 28, 2000) (IDS reference) in view of Hosotte-Filbert et al (U.S. Patent number 5,681,877, Patent issued Oct. 28, 1997) (IDS reference).**

With regard to **instant claims 67 and 96** from which claims 98-100 depend, Anton teaches a cosmetic composition comprising an oil component and a particulate matter component, wherein the composition further comprises an uncrosslinked synthetic polymer consisting of polymerized ethylenically unsaturated monomers of methacrylate ester monomers (see claim 1). Anton teaches at least two types of monomers, monomer "A" which, if polymerized, would yield a polymer having a glass transition temperature of -10 to 75°C, and monomer "B" which, if polymerized, would yield a polymer having a glass transition temperature of 76 to 120°C (see claim 1). It is noted that when the composition is in the form of the polymer "AAAABBBB" (which is a type of polymer taught in the table in column 4), that both **AAAABBB** and **AAAABBBB**

are block homopolymers, and **AAAABBBB** is an intermediate random block which comprises at least one constituent monomer from each of blocks A and B. It is further noted that the intermediate random block can also be defined as **AAAABBBB** or **AAAABBBB**. Anton teaches that mixtures of methacrylic acid esters can be utilized as either block (A) or (B) (see claims 6-12)

Anton fails to directly teach that the methyl methacrylate component can comprise blocks of acrylic acid.

Hosotte-Filbert teaches a cosmetic composition for improving wettability of solid particles comprising a block co-polymer which comprises blocks of acrylic (or methacrylic) acid and methyl methacrylate (see claims 1-3), this reads on **instant claims 98 and 99**. Wherein the acrylic acid is present in an amount of less than 50% by weight of the copolymer of acrylic acid and methyl methacrylate (see claim 1), this reads on **instant claim 100**.

It would have been obvious to one of ordinary skill in the art at the time the invention was made to utilize the acrylic acid blocks in the methyl methacrylate portion of the block copolymer of Anton. One would have been motivated to do so to allow for improved wetting of the cosmetic composition of Anton. There would be a reasonable expectation of success in the use of acrylic acid and methyl methacrylate since Hosotte-Filbert teaches that said copolymer is useful in cosmetic compositions.

#### *Response to Arguments*

Applicant argues in the remarks filed 11/18/2009 that Hosotte-Filbert fails to cure the deficiencies of Anton with regard to the independent claim, and therefore, the

references alone or in combination fail to render obvious the instant invention.

Applicant's arguments are not found persuasive since, as identified above, Applicant's arguments with regard to the alleged deficiencies of Anton are not found persuasive.

### ***Conclusion***

No claims allowed. All claims rejected. No claims objected.

The prior art made of record and not relied upon is considered pertinent to applicant's disclosure.

FR2140977 (translation attached) – teaches two different flanking blocks connected by an intermediate random block, wherein said intermediate block comprises monomers from the two flanking blocks.

**THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to TREVOR M. LOVE whose telephone number is (571)270-5259. The examiner can normally be reached on Monday-Thursday 7:30-5:30.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Sharmila Landau can be reached on 571-272-0614. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

TL

/David J Blanchard/  
Primary Examiner, Art Unit 1643